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# Supreme Court of the United States

OCTOBER, 1958

No. 831

FORD MOTOR COMPANY,
*Defendant and Appellant,*

*—against—*

ALEXANDER PARK, ET AL.,
*Plaintiffs and Appellees,*

THOMAS M. KAVANAGH, Attorney General,
*Intervenor and Appellee,*

THE APPEAL BOARD OF MICHIGAN EMPLOYMENT SECURITY COMMISSION and MICHIGAN EMPLOYMENT SECURITY COMMISSION,
*Defendants and Appellees.*

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FORD MOTOR COMPANY,
*Defendant and Appellant,*

*—against—*

JOHN L. DORSEY, ET AL.,
*Plaintiffs and Appellees,*

THE APPEAL BOARD OF MICHIGAN EMPLOYMENT SECURITY COMMISSION and MICHIGAN EMPLOYMENT SECURITY COMMISSION,
*Defendants and Appellees.*

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

## BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

### Statement

The issue before this Court is whether the construction by the Sureme Court of Michigan of the labor dispute

section of the State unemployment compensation statute created an invidious classification of employers without a rational basis, which renders the taxing provisions of the statute invalid under the Equal Protection and Commerce Clauses of the Federal constitution.

In their motion to dismiss (referred to "MD"), the Appellees do not discuss this issue. Instead, they "restate what appellees believe to be the only possible Federal question raised", (MD p. 5) as follows:

> "May the State of Michigan allow unemployment benefits without disqualification to *persons unemployed through no fault of their own* when their *involuntary* unemployment at plants of the Ford Motor Company in Detroit, Michigan results from a *strike* in a Canton, Ohio, Ford plant?" (Emphasis added)*

Appellees' "re-statement" thus attempts to divert attention away from the disqualification provision—Section 29—which is the section at issue in these cases. By use of the expressions "involuntary unemployment" and "persons unemployed through no fault of their own", Appellees suggest that the case instead arises under the power of the state to pay benefits to those whose unemployment is "involuntary" within the import of Section 2.

In this posture, Appellees' "re-statement" amounts to an erroneous statement of the facts inasmuch as all claimants here were found to have been "directly involved" in the labor dispute. On the facts in this case, the issue cannot be stated in terms which characterize claimants as "persons unemployed through no fault of their own".

It was found as a fact that all claimants in these cases were "directly involved" in the labor dispute which caused

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*The Intervenor, on page 2 of his Brief (referred to as "I. Br."), adopts Appellees argument.

their unemployment. See Appellant's statement of the case on pages 8 to 13 of the Jurisdictional Statement (referred as to "Juris. St.").

The finding that claimants were so "directly involved" was left undisturbed by the State Supreme Court.

Neither the Appellees, in their Motion to Dismiss, nor the Intervenor take issue with any statement of fact in Appellant's presentation of the case as set forth on pages 8 to 13 of the Jurisdictional Statement.

## I. THE FEDERAL QUESTIONS

Appellees contend that no substantial Federal question is presented. The Intervenor adopts Appellees' argument (I. Br. p. 2).

### A. The Equal Protection Clause

Appellees' contentions under this heading (MD, pp. 8-10) appear to be that (1) the validity of the Act has already been sustained; and (2) the "classification here involved" is not "invidious or palpably arbitrary" because other states have similar statutes containing labor dispute disqualification provisions involving a classification which hinges upon whether or not the labor dispute occurs at a particular "physical location".

#### (1) The validity of the statute as construed below presents a new Federal question of substance.

Appellees contend (MD, p. 9) that the "instant case is not the first time that the cry of 'equal protection' has been raised, without success, before this Court. *Lawrence Baking Company* v. *U. C. C.* 308 Mich. 198, 13 N. W. 2d

260, 154 ALR 660 (1944), in which petition for writ of certiorari was denied by the Supreme Court of the United States, October 9, 1944, 323 U. S. 738, * * *"

The short answer to the Appellees' contention is that the *Lawrence* case could not possibly have dealt with the "classification here involved" or the Federal questions here presented, because the "classification" here involved arose for the first time by reason of the unexpected overruling of the *Chrysler* case by the decision below. The *Lawrence* case arose in 1944 while the "functional integration" doctrine of the *Chrysler* case [*Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N. W. 87 (1941)] was still the law of Michigan.

The Federal question in the *Lawrence* case arising under the Equal Protection clause was based on the construction of Section 29 by the Supreme Court of Michigan which, it was contended, resulted in a "discrimination between employers by classifying them on the basis of (1) those who elected to stop work and close down and (2) those who do not elect to stop work or close down during a strike" (13 N. W. 2d p. 264). The State Supreme Court pointed out, however, that the legislature had to draw the line somewhere, and that the distinction drawn between a "stoppage of work" and a continuation of operations was reasonable and did not impinge upon the policy of the State to maintain neutrality in a labor dispute.

No such classification is here involved because there was a "stoppage of work" in the Michigan plants where claimants were employed. Moreover, such "stoppage of work" was not at Appellant's voluntary election, but was instead forced upon Appellant by reason of the strategically called strike at the Canton plant which brought pressure on Appellant by cutting off the flow of parts necessary for the continuation of operations in the Michigan plants. The stoppage of work here involved was thus not within the

category of voluntary "election" by the employer which was the crux of the classification ruled on in the *Lawrence* case.

Moreover, the *Lawrence* case did not reach the kind of classification here presented which is entirely different (Juris. St., pp. 7, 15, 19). The classification resulting from the decision below is arbitrary and capricious in that it discriminates between (1) an employer whose entire operations are at a single location, and (2) an employer whose functionally integrated operations are in two or more plants located at different places in Michigan or in Michigan and other states. No such question was reached in any of the cases cited by Appellees (MD, p. 10).*

In *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495 (1937) (MD, p. 10), the challenge was directed to *exclusion* from the Act of employers of less than eight, and to the *exemption* of particular employers. The Court held (301 U. S. at 511) that administrative convenience and expense were alone sufficient justification for the exclusion of small employers, pointing out that a State was not bound to assume the administrative cost of taxing employers having only a single employee. The Court pointed out also that the character of the exemptions—charitable institutions, public authority, and employers of agricultural laborers, domestic servants, etc.,—was such as to imply that the State had chosen, as the object of its statute, labor employed in the process of industrial production and distribution; and that sound reasons for such selections readily suggest themselves (p. 512). No question involving such *exclusions* and *exemptions* from the Act is here presented.

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*Lower Vein Coal Co.* v. *Industrial Board of Indiana*, 255 U. S. 144 (1921) (Compulsory inclusion of coal mining, a hazardous employment, within Workmen's Compensation law); *Ward & Gow* v. *Krinsky*, 259 U. S. 503 (1922) (extension of category of hazardous employment covered by Workmen's Compensation law).

The discrimination here is among the employers *included* within the Act. As pointed out in the Jurisdictional Statement (pages 6, 9, 14-24), the classification is one which is not only arbitrary and without rational basis, but also one which, by payment of unemployment benefits to claimants found to be "directly involved" in the labor dispute with consequent increased tax rates on their employer, involves the use of unemployment benefits to finance a labor dispute in contravention of the policy of the statute to maintain neutrality.

Appellees' condemnation of Appellant's quotation from *Allied Stores of Ohio* v. *Bowers*, 3L. ed. 2d 480 (1959) is frivolous. The *Allied Stores* case dealt with the policy of a state to encourage operations within the state by non-residents by granting to them certain tax advantages not available to residents engaged in similar operations. Appellees deprecate, as "culling out words of comfort from a portion of that decision" (MD, p. 8), the quotation (by Appellants on page 18 of the Jurisdictional Statement) of the "rule" that the "State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary". Appellees then set forth "the language which follows immediately after the quoted statement" with the assertion that it is this language "which lays down the rule of the [Allied Stores] case". But it is evident that the language on which Appellees rely was employed by the Court in its demonstration that the particular classification in the *Allied Stores* case did rest upon a rational basis in view of the policy of the state to encourage non-residents. Being thus addressed to a specific situation, "the language which follows immediately" after the statement by the Court of the general "rule" cannot be availed of by Appellees as demonstrating that the wholly different, invidious and palpably arbitrary classification here involved, which in

effect penalizes non-residents as well as residents, has any rational basis.

**(2) The statutes in other states are irrelevant as a matter of law and immaterial in fact.**

Appellees' second contention appears to be (MD, p. 11) that the classification made by the construction of the Michigan statute by the State Supreme Court below is not "invidious or palpably arbitrary" for the reason that statutes in other states follow "a similar method of classification", namely whether or not the "labor dispute" occurs at a particular "physical location", such as "establishment". There are two answers to this contention.

First, the statutes in other states, regardless of their provisions, are irrelevant as a matter of law to the issues in this case. Only the Michigan statute, as construed below, is involved here. The issue here is whether that statute, as so construed and applied to Appellant in the circumstances of this case, is valid under the Federal Constitution.

Second, even if we assume, as Appellees assert (MD, p. 11), that the "classification" in thirty-nine states and the District of Columbia "hinges upon whether or not the labor dispute in question occurs in the 'factory, establishment, or other premises'," and that the Michigan statute contained a similar provision*, that would all be immaterial and lacking in probative value insofar as Appellees' contentions here are concerned.

The problem here is not a necessary result of any such provision in the Michigan statute but instead was created by the construction given to the statute by the Supreme

*The provisions of Section 29 of the Michigan statute are, however, quite different. See Jurisdictional Statement, page 4. See, also, legislative history of Section 29 as set forth in the *Lawrence* case (13 NW 2d at pp. 261-2).

Court of Michigan. For example, the Unemployment Compensation Act of the Territory of Alaska contained a labor dispute provision providing for disqualification of a claimant where unemployment is due to a labor dispute in "the factory, establishment or other premises"—exactly the wording postulated by Appellees. But in *Unemployment Commission* v. *Aragon*, 329 U. S. 143 (1946), this Court ruled that the "labor dispute" was nevertheless "at the factory, establishment or other premises", although there was no strike, and although the negotiations were carried on at places far removed from the work site. In the *Aragon* case, this Court pointed out (p. 150) that the ruling was supported by the context in which "labor dispute" was used in the Social Security Act, as well as by the definition of "labor dispute" in the Norris-LaGuardia Act (29 USCA § 101), and in the National Labor Relations Act (29 USCA § 152[9]), all of which make clear that "labor dispute" is not limited to "strike".

As pointed out in Appellant's Application for Rehearing in the State Supreme Court (Appendix to Jurisdictional Statement, pages 51a-53a), the arbitrary classification here can arise only if a Court, in construing the Act, arbitrarily limits the term "labor dispute" to "strike". The Court below did just that. For the purposes at hand, the construction by that Court "become[s] a part of the statute[s]." *Wheeling Steel Corp.* v. *Glander*, 337 US 562, 566 (1949). Therefore, Appellees' attempt to equate words in the Michigan statute with words in statutes in other states is futile. Any asserted similarity in wording occurring in the Michigan statute, as written, and in the statutes of other states is an immaterial fact because of the gloss placed upon the Michigan statute by the Court below.

**B. The Commerce Clause**

The first contention of Appellees with reference to the Commerce Clause appears to be (MD, pp. 11-12) that

there is no "undue burden" on commerce for the asserted reason that, since benefits under the Michigan statute are paid out of a "pooled fund",* the rate of tax to a particular employer "*may* be, but not necessarily is" (emphasis by Appellees, MD, p. 12) affected by the payment of benefits in any particular case; and that there is "nothing in the record concerning what, if any, effect the payment of the claims here in question will have upon the tax rate of Appellant" (MD, p. 12).

There are two answers to this first contention. First, the testimony in the record in this case shows (R. 659b) that the benefits in question on this appeal in fact would have a direct bearing upon Appellant's tax rate. Second, the extensive quotation from the *Lawrence* case, appearing on page 11 of the Brief of the Intervenor, makes it clear that, under Michigan law, the payment of benefits are taken, for the purpose of presentation of a constitutional point, as necessarily resulting in an increase in the rate of contribution by the employer to the unemployment fund from which benefits are payable. The *Lawrence* case thus establishes that the impact of the taxing provisions gives to an employer a standing to present constitutional questions arising out of the payment of benefits pursuant to an interpretation by the court of Section 29.

The second contention of Appellees under the Commerce Clause appears to be (MD, p. 13) that *if* the increase in the tax rate would *not* be an "undue burden" had the strike occurred in a Michigan plant, then the "occurrence of the strike in Ohio creates no greater impact". In other words, if the increase in tax on employers selected according t

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*The "pooled fund" contention is specious because under Section 20 of the statute the benefits are charged against the individual "employers rating account." (See Juris. St. pp. 5, 6.) Thus, the payment out of a "pooled fund" is a mere matter of administrative convenience.

the classification would not be an arbitrary discrimination against them under the Equal Protection Clause, then it should follow that such increase in tax would not be an undue burden upon commerce. But this contention begs the question. It is no answer to say that the "undue burden" upon interstate commerce is also a burden upon local commerce. Manifestly, an "undue burden" upon interstate commerce cannot be justified by the imposition of a like "undue burden" upon local commerce. *Dean Milk Company* v. *City of Madison, Wisconsin,* 340 U. S. 349 (1951).

As pointed out in the Jurisdictional Statement, pages 16-24, since the classification here results in an arbitrary discrimination in violation of the Equal Protection Clause, the discrimination is therefore an undue burden upon Commerce when applied to Appellant in the circumstances of this case where the strike occurred at its plant in Canton, Ohio, in the course of a labor dispute in which the Michigan claimants were directly involved.

The third contention of Appellees under the Commerce Clause appears to be (MD, p. 14) based on an assumption that no "constitutional inhibition" would prevent the Michigan legislature, if it chose, from amending the labor dispute disqualification section so as to pay benefits "to *strikers* while they are on strike". (Emphasis by Appellees) On this premise, Appellees contend in effect that the State of Michigan is therefore free from any "constitutional inhibition" in the making of the invidious and palpably arbitrary classification among employers here involved because such arbitrary classification results only in a payment of benefits to claimants found to have been directly involved in the labor dispute which caused their unemployment—a limited result which falls far short of the asserted plenary power of a state to pay benefits to strikers on any basis.

But the assumption that a state has plenary power free from any inhibition under the Commerce Clause to adopt a

policy of paying benefits to strikers "while they are on strike" is a proposition which is not established. Appellees apparently rely (MD pp. 13-14) on a provision in the Social Security Act which imposes only the specific requirement that benefits shall not be denied by a state to any otherwise eligible individual for refusing to accept new work if the position offered is vacant due directly to "a strike, lockout, or other labor dispute". The imposition of this single limitation does not by implication authorize a state to adopt a policy of intervention in labor disputes by the financing of strikes through the payment of unemployment benefits taxed to the employer on an arbitrary and discriminatory basis. Congress itself has largely preempted the field of labor disputes in the passage of the National Labor Relations Act which embodies a Federal policy that public authority should maintain neutrality in labor disputes affecting commerce. In this connection it may be pointed out that the existing Federal legislation has by no means exhausted the full sweep of legislative power over industrial relations, given to the Congress by the Commerce Clause, and there remains a broad area of regulation which the state may not enter without potential conflict with Federal authority, *Cf., Building Trades Council* v. *Garmon,* United States Supreme Court, No. 66, Oct. Term 1958, April 20, 1959.

Moreover, even if Appellees' premise were accepted *arguendo,* the argument itself is analogous to the exploded doctrine that, because a state may totally prohibit certain action, it may permit such action upon unconstitutional conditions. For example, it is now firmly established that, while a state may refuse to admit foreign corporations to do business within its borders, and may arbitrarily exclude them, a foreign corporation once admitted to the state is entitled to equal protection under the laws applicable to domestic corporations. *Wheeling Steel Corp.* v. *Glander,* 337 U. S. 562, 571-2 (1949). Similarly, assuming *argu-*

*endo* the Appellees' premise that a state is free to decide whether to remain neutral or to participate in labor disputes, once a state determines to intervene in a labor dispute by the payment of benefits "to strikers while they are on strike", constitutional inhibitions would then require that the state action must be free from arbitrary discriminations among employers.

For the same reason, there is no merit in the Appellees' suggestion (MD, p. 14-15) that, since a state may draw a line between the plant of an employer, and the plant of its outside supplier, a state may therefore adopt the invidious and palpably arbitrary classification of employers resulting from the construction given below to the statute by the State Supreme Court. It does not follow that because a state may draw a line between separate employment units of *different* employers, where one is dependent upon the goods supplied by the other, that a state may draw a line between functionally integrated plants of a single employer where the result is to discriminate between employers otherwise similarly situated.

### C. The Concept of "Fair Play"

With reference to the contention of Appellees under the heading "The Concept of 'Fair Play'" (MD, pp. 15-16), it should be pointed out that Chief Justice Stone, in the majority opinion in *International Shoe Company* v. *State of Washington*, 326 U. S. 310 (1945) at p. 320, referred to the necessity for sufficient contacts or ties with the state of the forum to make it "reasonable and just, according to our traditional conception of fair play and substantial justice" to render a foreign corporation amenable to suit under the due process clause. The concepts of "fair play and substantial justice" and "reasonableness" are thus an integral part of our constitutional law. The Appellees have

quoted from the separate opinion of Mr. Justice Black who was of the view that less emphasis should be placed on such concepts.

Moreover, it is important to note that the concepts of "fair play and substantial justice" and "reasonableness" enter importantly into the policy of the state to remain neutral in labor controversies. In the *Lawrence* case, the Supreme Court of Michigan (13 N. W. 2d, p. 265) pointed out that the policy of the State, as appears from the statute, is to grant benefits only in conformity with such neutrality. In support of this policy, the Court in the *Lawrence* case quoted from the opinion of Justice Wiest in *Chrysler Corp. v. Smith, 297 Mich.* 438 at pp. 446, 447, 298 N. W. 87 at p. 90—the decision overruled by the opinion below in the present case—where he approved of the statement of policy by the Appeal Board in the *Chrysler* case:

> "* * * All interested parties who are involved in a claim for unemployment compensation * * * must be dealt with on an impartial basis. The unemployment compensation fund should never be used to finance claimants who are directly involved in a labor dispute, nor should it ever be denied to claimants who are legally entitled to receive benefits. * * * None of the money accumulated in this fund should ever be disbursed for the purpose of financing a labor dispute nor should it be illegally withheld for the purpose of enabling an employer to break a strike. The State of Michigan, insofar as this Act is concerned, must remain neutral in all industrial controversies."

Thus, the use in the present case of unemployment benefits (resulting in increased taxes on the employer) to finance a strike by the payment of benefits to claimants found in fact to be directly involved in the labor dispute, is contrary to the policy of "fair play" of the State as stated in the *Chrysler* case, and as confirmed by the *Lawrence* case.

Despite the overruling of the *Chrysler* precedent by the Court below in this case, Intervenor nevertheless quoted in full from the *Lawrence* case the foregoing excerpt from the *Chrysler* case, and affirmed that (I. Br. p. 13):

> "This still continues to be the avowed policy of the Michigan Courts."

## II. TIMELY PRESENTATION OF THE FEDERAL QUESTIONS

The whole line of Appellees' (MD, pp. 16-18) and Intervenor's (I. Br. pp. 3-8) contentions and arguments under this heading is based on the assumption that Appellant reasonably could and should have anticipated the decision of the Supreme Court of Michigan below from the inception of this litigation.

On the basis of this assumption it is urged, by implication, that Appellant should have raised the Federal questions at the inception of these proceedings when Appellees presented their claims to the Michigan Employment Security Commission, reasserted the Federal questions when Appellees appealed to the Circuit Court from a series of administrative rulings in Appellants' favor, and reasserted the Federal questions upon Appellees' appeal to the Supreme Court of Michigan (MD, p. 16; I. Br. pp. 3, 6). From the foregoing assumption and contentions it is argued that, since Appellant failed to present the Federal question in the lower court, the Supreme Court of Michigan, under state procedural law, would not consider the constitutional issues (MD, pp. 16-17; I. Br. 4) and therefore this Court is without jurisdiction because the State Supreme Court did not pass upon the Federal questions pre-

sented by Appellant's Application for Rehearing in the Supreme Court of Michigan.*

The assumption, and the related contentions and arguments, are irrelevant because all are based on the false premise that the Federal questions here presented arose in the trial court (MD, p. 17; I. Br. p. 6).

In fact, the Federal questions here presented arose for the first time by reason of the decision of the Supreme Court of Michigan below which created an invidious and palpably arbitrary classification of employers which did not theretofore exist.

As pointed out in the Jurisdictional Statement (p. 14), no Federal right or claim of right of Appellant had been infringed prior to the decision of the State Supreme Court below. The objection upon Federal grounds to such infringement of appellant's rights could not have been made until after that decision. The application for rehearing therefore presented the first opportunity for raising such Federal questions. Presentation of the Federal questions was therefore timely.

Moreover, (1) the basic assumption by Appellees and Intervenor is false: the decision below, and consequent arbitrary classification thereby created, could not have been anticipated; (2) the contentions as to state procedural law are unsound; and (3) jurisdiction of this Court is not affected by summary denial by the Supreme Court of Michigan of Appellant's Application for Rehearing without reference to the Federal questions.

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*But in opposing Appellant's Application for Rehearing below, Appellees' contention was that the Application for Rehearing presented nothing new, and that the Supreme Court of Michigan *did* give "due consideration of the Alleged Constitutional issues" briefed below by Appellant (See Appendix to Jurisdictional Statement, pp. 57a-58a).

**(1) The arbitrary classification of employers created by the decision below could not have been anticipated.**

As pointed out in the Application for Rehearing in the Supreme Court of Michigan (Appendix to Jurisdictional Statement) (pp. 48a-50a), the invidious and palpably arbitrary classification here complained of did not result from a mere overruling of the *Chrysler* precedent. Rather, it was created by the combined effect of the overruling by the decision below of established Michigan law on three separate and distinct points in the interpretation of Section 29(1)(b) and the substitution in lieu thereof of the following series of changes made expressly, or by necessary implication, in the construction of the Section: (a) The "labor dispute" was required to be "in the establishment" of employment; (b) The concept of "establishment" was changed by limiting it to the physical premises of the employer at a single location; and (c) The concept of "labor dispute" was changed by limiting it to "strike".

None of these changes could reasonably have been anticipated by Appellant. Certainly it would have been impossible to have anticipated the impact of the combined effect of all three of this series of changes.

(a) An amendment of the statute in 1941 shifted the connotation of a physical location from "labor dispute" to "stoppage of work." As pointed out in the *Lawrence* case (13 N. W. 2d p. 262), as initially enacted in 1936 the Michigan disqualification provision originally had referred to unemployment *"due to a labor dispute* * * * actively in progress *in the establishment"*. In that context it would have been open for Appellees to advance, as a premise, the proposition that the classification hinged upon whether or not the "labor dispute" occurred "in the establishment". But that was changed in 1941. The 1941 amendment changed the emphasis on physical location "in the establishment" from

"labor dispute" to "stoppage of work". As amended, the section refers to unemployment *"due to a stoppage of work* existing because of a labor dispute in *the establishment"*. (Italics by the Court). The *Lawrence* case therefore held that (p. 264) the statute, as amended, meant that the "stoppage of work" must be in the "establishment". By implication the import of this ruling in the *Lawrence* case was that the words "existing because of a labor dispute" were intended to characterize the nature of the work stoppage (in the establishment) and were not intended to limit the application of Section 29 to situations where the labor dispute is in the "establishment" where claimant was employed. This aspect of the *Lawrence* case was, by necessary implication, overruled by the decision below.

(b) The concept of "establishment" under the *Chrysler* precedent included all functionally integrated operations of the employer whether or not located at a single place. The Court below specifically overruled this aspect of the *Chrysler* case and held, in effect, that "establishment" was limited to a single physical location (see Juris. St. pp. 15-16; Appendix to Juris. St. pp. 38a, 53a, 54a). Both Appellees (MD, pp. 17, 18) and Intervenor (I. Br. pp. 6, 7, 8) assert that this should have been foreseen, even at the trial court stage of this litigation (I. Br. pp. 6, 8)—notwithstanding the obvious fact that *Chrysler* was binding upon the lower court! That Appellant could not reasonably have foreseen the overruling of the *Chrysler* precedent below is obvious from the following admission appearing on page 8 of the Intervenor's Brief to the effect that for 17 years *Chrysler* had been followed without challenge prior to the present decision:

> "It is true the 'functional integration' doctrine propounded in *Chrysler* had been the law in Michigan, for a period of 17 years. But the doctrine had *not* been challenged *prior* to the present *decision."* (Emphasis added).

(c) The change in interpretation of "labor dispute" from a controversy over wages to a "strike" could not have been foreseen. In the *Chrysler* case (298 N. W. at 95) the Supreme Court of Michigan had ruled that a claimant is "directly interested" in a "labor dispute" when his "wages, hours, or conditions of work will be affected by the outcome of the dispute". This concept of labor dispute was in accordance with the definition of labor dispute which had already been codified in 1932 in the Norris-LaGuardia Act [29 USCA § 113(c)], and in the National Labor Relations Act in 1935 [49 Stat. 449, 450 29 USCA § 152(9)], *prior* to initial passage of the Michigan Unemployment Compensation Act in 1936.

And the decision below, in effect limiting "labor dispute" to strike, is even more surprising in view of the fact that the Michigan statute purported to be passed pursuant to sub-section 5 of Sec. 903(a) of the Social Security Act (49 Stat. 640, 1935) which requires that the state act contain a provision (quoted by Appellees, MD, pp. 13-14) which uses the term "labor dispute" in a context precluding an interpretation limiting it to "strike". See, in this connection, the analysis by Chief Justice Vinson in *Unemployment Commission* v. *Aragon*, 329 U. S. 143, 150 (1946). It could not have been foreseen that the decision below would not at least follow the *Aragon* case on the interpretation of "labor dispute".

The foregoing considerations emphasize the soundness of the ground on which Appellant (Juris. St., p. 16) distinguished *Herndon* v. *Georgia*, 295 U. S. 441 (1935), on which Appellees (MD, p. 18) and Intervenor (I. Br. p. 6) both rely.* In the *Herndon* case, the appellant in this Court

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*The lack of substance in Appellees' criticism of Appellant's quotation from the *Herndon* case (MD, p. 18) is made evident by a reading of the more extensive quotation by Intervenor from the *Herndon* case on page 6 of his Brief.

(also appellant below) contended (p. 443-4) that the "question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution." The Court recognized the validity of the principle of jurisdiction thus invoked by appellant, but pointed out that the ruling challenged had merely followed a *prior* decision of the State Supreme Court which had been handed down "several months" *before* the action of the trial court. It was accordingly held that appellant could not "plead ignorance" of the *prior* decision of the State Supreme Court and was therefore bound to anticipate the probability of a similar ruling by the trial court in his own case.

That is not the situation here. Indeed, both Appellees and Intervenor concede that by the decision below the State Supreme Court for the first time departed from the *Chrysler* doctrine. Moreover, the Appellant here was also surprised, not only by the overruling of *Chrysler*, but by changes in the law including the novel interpretation of "labor dispute" which, as pointed out above, could not possibly have been anticipated.

**(2) Appellant was not required, as appellee below, to anticipate constitutional issues.**

The contention by Appellees (MD, pp. 16, 17) and Intervenor (I. Br. pp. 4-8) that the Appellant here was required to anticipate potential constitutional issues at each stage of this litigation is unsound under both State and Federal procedural law.

The Appellant here had been the prevailing party throughout from the initial administrative ruling to the decision by the Circuit Court of Wayne County. *Claimants* were the *appellants* in the Supreme Court of Michigan.

In this posture, the Appellant here, as *Appellee in the State Supreme Court*, under well established principles of law, was free to urge before the *State Supreme Court* any proposition of law in support of the decision of the Circuit Court in its favor regardless of whether or not such question of law had been raised in the Circuit Court. In *Menendez* v. *City of Detroit*, 337 Mich. 476, 60 NW 2d 319 (1953), the Supreme Court of Michigan said (60 NW 2d at p. 323):

> "* * * These [Michigan] cases hold * * * that an appellee need not take a cross appeal in order to urge, in support of relief afforded him below, reasons other than those adopted by or those rejected by the lower court."

As said in *Marshall* v. *Pletz*, 317 U. S. 383, 390 (1943):

> "Although the point is raised [by respondent] for the first time in this court, if we find it meritorious we may consider it as supporting the judgment below."

To the same effect, see *Ormsby* v. *Barr*, 22 Mich. 80 (1870); *Jaffke* v. *Dunham*, 352 U. S. 280, 281 (1956); *U. S.* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435-6 (1924).

Accordingly, the Appellant here, as the Appellee in both the Circuit Court and the State Supreme Court, was not required to, but was free to, anticipate in either of those courts any point of constitutional law in support of the decisions below in its favor. Vigorous anticipation of any constitutional point in the Circuit Court might have been interpreted as a sign of weakness on the fact issues. In any event, it could have served no useful purpose because *Chrysler* and *Lawrence* were binding on that court. But the situation was different on appeal by the Appellees here to the Supreme Court of Michigan because that Court had

the power to overrule its own precedents however long standing and well established.

The Appellant here, as Appellee below, out of an abundance of caution was free to and did call to the State Supreme Court's attention certain considerations of law under the Commerce, Equal Protection, and Due Process Clauses of the Federal constitution. These not only were in support of the judgment of the Circuit Court in Appellants favor but also inhibited the Supreme Court of Michigan from any construction that would result in a greater tax on the privilege of employment in the State than would have been imposed if the Appellant's organization and the labor dispute had not extended across state lines, but instead had been wholly within the State. See Portion of Ford Motor Company's Brief in State Supreme Court Dealing with Federal Questions, Appendix to Jurisdictional Statement, pages 29a-37a.

The invidious and palpably arbitrary classification of employers here complained of did not however result from a mere refusal of the Court below to apply existing precedents to organizations and labor disputes extending across state lines. It resulted, instead, from the combined effect of the overruling by the decision below of established Michigan law on three separate and distinct points. As pointed under II(1) above, Appellant did not and could not have anticipated any such result. The precise constitutional issues that arose for the first time by reason of the decision below were duly presented in the Application for Recording, (Appendix to Juris. St. pp. 38a-56a).

It is clear therefore that Appellant had been diligent in the raising of the Federal questions. Indeed, in the circumstances of this case, it could not possibly have done more.

The cases relied on by Appellees (MD, pp. 16-17), and Intervenor (I. Br., p. 4), are clearly distinguishable. In each of these cases: *City of Dearborn* v. *Village of Allen*

*Park*, 348 Mich. 449, 83 N. W. 2d 447 (1957); *Stembridge* v. *State of Georgia*, 343 U. S. 541 (1952); *Bailey* v. *Anderson*, 326 U. S. 203, 206-7 (1945); *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 309, 313 (1903); *Herndon* v. *Georgia*, 295 U. S. 441 (1935), the *appellant below* was the one attempting on appeal to the United States Supreme Court to obtain reversal of the decision below against him as erroneous on a ground not presented by him below.*

**(3) The Jurisdiction of this Court is not affected by the denial by the Supreme Court of Michigan of Appellant's Application for Rehearing below.**

Since the Federal questions were presented at the first opportunity, the jurisdiction of this Court is not affected by action of the State Supreme Court in summarily denying the Application for Rehearing without reference to the Federal questions. Such Federal questions were necessarily decided in the disposition which the Supreme Court of Michigan made of these cases on rehearing. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 678 (1930);

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*However, even if Appellant had been the appellant below, Appellant would not necessarily have been precluded from reliance on a constitutional point based solely on a question of law. In *Dation* v. *Ford Motor Co.*, 314 Mich. 152, 22 N. W. 2d 252 (1946) the Supreme Court of Michigan considered a constitutional point under the Workmen's Compensation Law raised for the first time by an appellant in that court. The Court, in distinguishing earlier cases following the general rule that a point not raised below will be disregarded, made the following distinction (p. 255):

> "* * * In each of these decisions [applying the general rule], however, the question sought to be raised on appeal involved the determination of issues of fact rather than the constitutionality of a statutory provision directly involved in the controversy.
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> * * *
>
> "The general rule that a question may not be raised for the first time on appeal to this court is not inflexible. When consideration of a claim sought to be raised is necessary to a proper determination of a case, such rule will not be applied."

*Missouri* v. *Gehner*, 281 U. S. 313, 320 (1930); *Saunders* v. *Shaw*, 244 U. S. 317, 319 (1917).

## III. BASIS OF DECISION BELOW

Appellees (MD, pp. 18-19) and Intervenor (I. Br. pp. 9-10) contend that this Court is without jurisdiction because the decision below was based on an interpretation of a state statute. This, it is asserted, is necessarily an adequate non-federal ground.*

The contention is obviously without substance because it overlooks the fact that, for the purposes of these cases, the construction given by the State Supreme Court to the statute is accepted as and for the act of the legislature. Such construction, for present purposes, becomes a part of the statute. *Allied Stores of Ohio* v. *Bowers*, 3 L. ed. 2d 480 (1959). The statute, thus interpreted and applied, therefore remains within the reach of Federal jurisdiction under Title 28 USCA § 1257 (2) to the same extent as though the legislature had itself specifically set forth that construction in the statute. If it were otherwise, a state court could evade the reach of Federal jurisdiction by the simple device of placing a gloss on the statute sought to be reviewed.

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*The "adequate non-federal basis" decisions cited (MD, p. 19) (I. Br. p. 9) involved no such proposition: *Enterprise Irreg. District* v. *Farmers Mut. Canal Company*, 243 U. S. 157, 163-4 (1917) (decision based on "estoppel *in pais*", a "plainly non-federal" ground); *Herb* v. *Pitcairn*, 324 U. S. 117, 120-124 (1945) (dismissal of action not within jurisdiction of City Court); *Eustis* v. *Bolles*, 150 U. S. 361, 368 (1893) (acceptance of money awarded under "composition act" held under state law to be an estoppel or waiver of right to object to validity of composition act).

## CONCLUSION

The Motion to Dismiss should be denied and probable jurisdiction noted in these cases.

Respectfully submitted,

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